Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

William A. Cox,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court resolve the three-way conflict among seven circuits over whether a federal judge can require a defendant to serve a term of imprisonment consecutively to another sentence that has not yet been imposed?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Allen Cox respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-2a) and the district court's order (Pet. App. 3a-11a) sentencing petitioner are unpublished. The court of appeals issued its opinion on April 21, 2005 and denied rehearing and rehearing en banc on June 7, 2005. Pet. App. 12a. On August 24, 2005, Justice Breyer extended the time to file this petition to and including October 5, 2005. App. No. 05A191. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. 3584(a) provides:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT

This case presents a fundamental and recurring question of federal law regarding criminal sentencing, one with serious implications for the uniform administration of justice,

federalism, and the separation of powers. Judges frequently confront the question whether defendants should be required to serve multiple terms of imprisonment consecutively or concurrently. Congress has authorized federal district judges to specify whether their sentences will be consecutive or concurrent in two circumstances: when multiple sentences are imposed "at the same time" or when the defendant at the time of sentencing is "*already subject to* an undischarged term of imprisonment." 18 U.S.C. 3584(a) ("Section 3584(a)") (emphasis added).

Section 3584(a) does not, however, authorize a federal district judge to order that a criminal sentence being imposed must be served concurrently or consecutively to a sentence that has not yet been imposed (hereinafter, "an unimposed sentence"). Thus, nothing in Section 3584(a) gives a federal district court the power to override the considered judgment of another court – including a state court – imposing a later sentence to make its sentence concurrent or consecutive to the prior federal sentence. Reading Section 3584(a) to limit a judge's control over whether sentences should be served concurrently with or consecutively to only those sentences existing at the time he or she acts is most consistent with the plain language of the statute, better respects the legitimate interests of other sovereigns in structuring sentences, and avoids serious separation of powers problems.

Despite the plain language of Section 3584(a), the district court in this case ordered that petitioner's sentence be served consecutively to *any* terms of imprisonment imposed later. Sentencing Hr'g Tr. 26. In other words, the district judge purported to issue an order prohibiting *all* later sentencing courts from determining, based on the facts before them, that concurrent service would be more appropriate.

In affirming that order, the Tenth Circuit acknowledged that the issue before it was the subject of an entrenched circuit conflict. Pet. App. 1a-2a (collecting cases). To date, seven courts of appeals have adopted three different rules. Four

circuits (including the Tenth Circuit in this case) empower the first judge to control a later judge's sentence. One circuit holds that district courts lack this power, and instead confides to the Attorney General the power to decide whether sentences will be served concurrently or consecutively. Two other circuits hold categorically that a district court may not impose a sentence consecutive to an unimposed term of imprisonment. These courts recognize that the plain language of the statute, common sense, the interests of comity and separation of powers, and the legislative history all confirm that a district judge may not control later sentencing.

Because only this Court can bring the required uniformity to federal sentencing, and because the decision below is erroneous, certiorari should be granted.

1. This case involves two separate crimes committed by petitioner William Allen Cox. The first crime involved a violation of Colorado law: in the winter of 2003, petitioner killed Gene Watson during a drug-related dispute. U.S. C.A. Br. 14-15. The second crime involved a federal charge: petitioner participated in the armed robbery of a Colorado gun store. *Id.* 4-6.

Petitioner pleaded guilty to both charges. Both courts were aware of the pending charges in the other court. Petitioner's plea bargain with the Colorado state authorities specified that he would plead guilty to second-degree murder in return for a forty-eight-year sentence to be served concurrently with any federally imposed sentence. Petr. C.A. Br 3. The presentence investigation report prepared by the federal probation officer, by contrast, recommended that petitioner's federal sentence run consecutively to the contemplated state sentence. *Id.* 4.

When it was notified of the federal government's intent to seek a consecutive sentence, the state trial court acted to ensure that it would be able to take the federal sentence into account by vacating the forty-eight-year sentence it had

previously imposed and awaiting the imposition of the federal sentence before acting. U.S. C.A. Br. 18-19.

Upon learning that there was now no already-imposed state sentence, the federal district court rescheduled petitioner's federal sentencing and ordered briefing on the question "whether the sentence of this court may or must be imposed consecutively in whole or in part to the sentence to be imposed in the aforementioned state court matter." Petr. C.A. Br. 4.

At the September 1, 2004 sentencing hearing, the district court decried the "extraordinary" efforts taken by the state court to conform to the terms of petitioner's state plea agreement. Sentencing Hr'g Tr. 16. It then imposed an aggregate sentence of 168 months, to be served consecutively "to *any sentence yet to be imposed* in state court, including Denver County District Court, Colorado, Case Number 2003CR2984." Pet. App. 5a (emphasis added).

Because the state was committed to ensuring concurrent service, on March 18, 2005, it took the extraordinary step of releasing petitioner on a personal recognizance bond. Denver County Dist. Ct., Case No. 2003 CR 2984, Minute Order (Mar. 18, 2005). Petitioner is currently in federal custody in a federal prison serving his 168-month federal sentence. Petitioner still has not been sentenced on the pending state charge.

2. On appeal, petitioner challenged only the district court's authority to require that its sentence be served consecutively to an unimposed state sentence. The court of appeals affirmed. The court acknowledged the circuit split regarding the question presented but deemed itself bound by its prior ruling in *United States* v. *Williams*, 46 F.3d 57, cert. denied, 516 U.S. 826 (1995), that such a sentence is permissible. Pet. App. 2a. The court thus agreed with petitioner that it could "do nothing for him." *Ibid.*

3. The Tenth Circuit denied rehearing and rehearing en banc. Pet. App. 12a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law on which the circuits are avowedly intractably divided. Congress has provided by statute that district courts control whether a sentence they impose is to be served concurrently or consecutively in only two particular circumstances: "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." 18 U.S.C. 3584(a). There is a longstanding, widely recognized, and deeply entrenched three-way conflict among seven circuits over whether, despite this plain language, a federal district court may nonetheless also require that a sentence it imposes run consecutively to another sentence that has not yet been imposed. This question recurs frequently because a significant number of defendants are sentenced in federal court while criminal charges are also pending in another state or federal court. Four courts of appeals – including the Tenth Circuit in this case – have construed Section 3584(a) to permit a district court to order that its sentence be served consecutively to an as-yet-unimposed sentence. Several other circuits squarely reject that interpretation as contrary not only to the plain meaning of the statute, but also to the principles of federalism, separation of powers, and the uniform administration of justice. Although this Court declined several years ago to grant certiorari on the question presented, see *Andrews* v. *United States*, 330 F.3d 1305 (CA11), cert. denied, 540 U.S. 1003 (2003), this case is a better vehicle for this Court's review than *Andrews*. See *infra* at 24-25. Because only this Court can bring the required uniformity to federal sentencing, and because the decision below is erroneous, certiorari should be granted.

I. The Circuits Are Irreconcilably Divided Over the Construction of 18 U.S.C. 3584(a).

1. In the Sixth and Ninth Circuits, the sentence imposed on petitioner by the district court would have been invalid. These circuits hold that federal district courts do not possess the remarkable power to order that their sentences run consecutively to an as-yet non-existent sentence. *United States* v. *Quintero*, 157 F.3d 1038, 1039-40 (CA6 1998); *United States* v. *Clayton*, 927 F.2d 491, 492 (CA9 1991). Moreover, although the Second Circuit has not directly addressed the question, it has strongly suggested that it agrees.[1]

But petitioner was sentenced in the Tenth Circuit, which – along with the Fifth, Eighth, and Eleventh Circuits – holds that a federal judge may, in effect, bind a future judge by ordering a sentence to run consecutively to an unimposed state or federal sentence. See Pet. App. 1a-2a; *United States*

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[1] Although the Second Circuit had interpreted a predecessor to Section 3584(a) as granting federal courts authority to order a sentence to run consecutively to an unimposed state sentence, see *Salley* v. *United States*, 786 F.2d 546, 547-48 (CA2 1986), that court has more recently held (in square conflict with the Seventh Circuit, see *infra* at 7-8) that Section 3584(a) does not establish a default rule that a federal sentence will run consecutively to an unimposed state sentence when the federal sentencing judge is silent. See *Abdul-Malik* v. *Hawk-Sawyer*, 403 F.3d 72, 75 (CA2 2005) ("the absence of any specification by the federal court as to whether its sentence should run concurrently or consecutively does not signify intent that the sentences run consecutively because the federal court may not even know that another sentence is about to be imposed"); *McCarthy* v. *Doe*, 146 F.3d 118, 122 (CA2 1998) ("there is no basis to infer any intention as to consecutive or concurrent service from the [federal] sentencing judge's silence, which could equally well indicate either that the judge did not know another sentence would be imposed, or did not know what the future [state] sentence would be").